

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**CIVIL DIVISION**

**Civil Suit No: 0291 of 2013**

**BETWEEN**

**GEORGE JEMMOTT**

**CLAIMANT**

**AND**

**TERRANCE PRESCOD**

**FIRST DEFENDANT**

**MINISTRY OF TRANSPORT  
AND WORKS**

**SECOND DEFENDANT**

**THE ATTORNEY GENERAL  
OF BARBADOS**

**THIRD DEFENDANT**

*Before The Honourable Madam Justice Pamela Beckles, Judge of the  
High Court*

**2016: August 31**

**2019: April 26**

**Appearances:**

**Mr. Wilfred Estwick, Attorney-at-law in association with  
Joseph H. Serrant for the Claimant**

**Ms. Nicole Roachford, Attorney-at-law for the First Defendant**

**Mr. Jared Richards, Attorney-at-law for the Second and Third  
Defendants**

## **DECISION**

### **INTRODUCTION**

- [1] On 3 March 2009, the Claimant was injured during his course of employment by the First Defendant.
- [2] On 22 February 2013, he filed his statement of claim claiming damages against all three Defendants for injuries sustained as a result of the said incident.
- [3] This is an application filed on 3 May 2016 for the Claimant's statement of claim to be struck out.

### **BACKGROUND AND PROCEEDINGS**

- [4] The Claimant and the First Defendant were at all material times employed as a road works supervisor and a labourer respectively.
- [5] The Claimant in his statement of claim stated that during his course of employment on 3 March 2009, the First Defendant viciously attacked him.
- [6] As a result of this attack he alleged that he suffered from pain and shock and was taken to the Hospital where he was examined, given medication and placed on sick leave.
- [7] The Claimant noted that while he was on sick leave, he attended Dr. Kapadia because he was experiencing excruciating pain in his lower back, right shoulder and neck and he also complained of being unable to stand.
- [8] A medical report dated 9 July 2009 was submitted which gave a description of the Claimant's injuries, noted the tests done and the treatment prescribed by the Doctor.

- [9] On 5 March 2013 the Third Defendant filed an acknowledgement of service indicating an intention to defend the Claimant's claim.
- [10] On 29 July 2014 the First Defendant filed a defence where he denied attacking the Claimant but instead insisted that it was the Claimant who attacked him on 3 March 2009 while he was having a vocal argument with one Alwyn Herbert. The First Defendant also pointed out in his Defence that the claim is statute barred pursuant to the Limitation of Action Act, Cap. 231.
- [11] The Second and the Third Defendants filed their Defence on 11 August 2014 where they put the Claimant to strict proof of the alleged incident which occurred between the Claimant and the Second and Third Defendants. They further denied that the consequential injuries sustained by the Claimant from the First Defendant's negligence and/or reckless behavior are in law attributed to them.
- [12] Counsel for the Second and Third Defendants put the Claimant to strict proof that the injuries sustained were caused by the Defendant's breach of their statutory or common law duty and was contrary to **section 22(b)** and **section 24** of the Factories Act, Cap. 347. Counsel also put the Claimant to strict proof that the injuries sustained are so closely connected with his employment as to hold the Defendants vicariously responsible.
- [13] On 19 March 2015 the Claimant filed an amended statement of claim where at paragraph 6 the Claimant inserted the words "and battered" so that the paragraph read, "that on the 3 March 2009 the First Defendant, while working with the Claimant, viciously attacked and

battered the Claimant while the Claimant was in the course of his employment,” and the particulars for breach of statutory duties were completely deleted from the statement of claim.

[14] In August 2016, the Claimant filed an application for the amended statement of claim to stand notwithstanding that permission was not obtained for the filing of the amendment. An affidavit in support accompanied the application where inter alia, Counsel for the Claimant pointed out that in filing the amendment, consideration was not given to the fact that a defence had been filed and that permission for the amendment should have been made to the court.

[15] In the amended statement of claim, the Claimant noted that the fault and negligence are alleged on the part of the Second Defendant because of the vicarious relationship which existed between the First Defendant and the Second Defendant. The Claimant also noted that the Second Defendant should have known of the First Defendant’s propensity to behave in a violent and dangerous condition as well as his criminal record.

[16] Counsel noted that a review of the statement of claim filed on 22 February, 2012 revealed that the cause of action was inadvertently stated as personal injury and since the incident occurred on 3 March 2009, the cause of action stated was clearly an error.

[17] On 26 February 2016 an order was made permitting the amended statement of claim filed 19 March 2015 to stand, notwithstanding the fact that prior permission was not obtained for the filing of the amendment, granting leave to the Defendants to file amended

- Defences in 21 days and awarding costs to the First Defendant in the sum of \$750.00.
- [18] Counsel for the Second and Third Defendants, on 3 May 2016 filed a notice of application accompanied by an affidavit for the Claimant's amended claim filed 19 March 2015 to be struck out pursuant of Rule 26.3(3) of the Supreme Court Civil Procedure Rules 2008 (CPR) for court orders during or after court proceedings on the grounds that it discloses no reasonable ground for bringing the claim; it fails to disclose a cause of action in law and it was filed outside of the time delimited for the filing of the same contrary to **section 3** of the Limitation (Public Authorities) Act, Cap. 206.
- [19] On 18 May 2016, Counsel for the First Defendant made an application to have the Claimant's amended claim form and statement of claim struck out pursuant to Part 26.3 of the CPR on the premise that the action for personal injuries expired on 3 March 2012 and the claim form was only filed on 22 February 2013.
- [20] She stated that since the cause of action was stated as battery and not personal injury and since there is no claim for injury to the person, there is no remedy of general damages; moreover, that since there is no claim for personal injury, there is no need to rely on medical reports establishing such injury. She also pointed out that the Claimant failed to file evidence in respect of special damages and therefore should not be allowed to adduce any at trial.
- [21] The Claimant strongly opposes the Defendant's applications to have the amended claim form and statement of claim struck out.

## ISSUE

- [22] The issue which arises for the Court's determination is whether the Claimant's claim should be struck out pursuant to Part 26.3(3) of the CPR.

## LAW AND ANALYSIS

- [23] Part 26.3(3) of the CPR gives to the court wide powers upon an application to strike out a statement of case or part of a statement if it appears to the court:

- “(a) ...the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;
- (b) the statement of case or the part to be struck out discloses no reasonable ground for bringing or defending a claim; or
- (c) the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10.”

- [24] Generally speaking, striking out a statement of claim or a part thereof is deemed to be a draconian measure in that it deprives a party of its right to a fair trial, therefore it should be used sparingly and only in exceptional circumstances.

- [25] In *Citco Global Custody NV v Y2K Finance Inc.*, *ECSC Civil Appeal No. 22 of 2009 [BVI]* **Edward JA** set out the principles which ought to guide a court when considering an application to strike out a statement of case. The learned judge stated:

- “[13] On hearing an application made pursuant to CPR 26.3(1)(b) the trial judge should assume that the facts alleged in the statement of case are true. Despite this general approach, however, care should be taken to distinguish between primary facts and conclusions or

inferences from those facts. Such conclusions or inferences may require to be subjected to closer scrutiny.

[14] Among the governing principles stated in Blackstone's Civil Practice 2009 the following circumstances are identified as providing reasons for not striking out a statement of case: where the argument involves a substantial point of law which does not admit a plain and obvious answer; or the law is in a state of development or where the strength of the case may not be clear because it has not been fully investigated. It is also well settled that the jurisdiction to strike out is to be used sparingly since the exercise of the jurisdiction deprives a party of its right to a fair trial, and its ability to strengthen its case through the process of disclosure or other court procedures such as requests for information; and the examination and cross-examination of witness often change the complexion of a case..."

[26] Judicial authorities have shown that the striking out of an action should only be done in plain and obvious cases. In Baldwin Spencer v The Attorney General of Antigua and Barbuda et al (Civil Appeal No. 20A of 1997) **Sir Dennis Bryron** noted that:

"this summary procedure should only be used in clear and obvious cases, when it can be seen on the face of it, that the claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court."

[27] The court in Belize Telemedia Limited and Another v Magistrate Usher and Another BZ 2008 SC 40 (Belize Telemedia) also defined what disclosing no reasonable ground for bringing or defending a claim means. It noted that it addresses the two following situations:

"(1) where the content of a statement of case is defective in that, even if every factual allegation contained in it were proved, the party whose statement of case it is cannot succeed; or

- (2) where the statement of case no matter how complete and apparently correct it may be, will fail as a matter of law.”

[28] So that, as was stated by **Harris J** at pages 29-30 in *S&T Distributions Limited v CIBC Jamaica Limited and Royal and Sun Alliance JM 2007 CA 44*:

“...it is clear that a claim will only be struck out as disclosing no prospect of success contemplates the existence of a reasonable cause of action if it is obvious that the claimant has no real prospect of successfully prosecuting the claim. Real claim which carries with it realistic prospect of successfully prosecuting the claim as opposed to a “fanciful” prospect.”

[29] Additionally, in considering whether the strike out a statement of claim, the court must always be mindful to consider the overriding objective of the CPR. In the House of Lords decision *Real Time Systems Limited v. Review Investments Limited [2014] UKPC6*,

**Lord Mance** stated at paragraph 17:

“...the court has an express discretion under Rule 26.2 whether to strike out (“it may strike out”). It must therefore consider any alternatives, and Rule 26.1 (1)(w) enables it to “give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective;” which is to deal with cases justly. As the editors of the *Caribbean Civil Court Practice (2011)* state at Note 23.6, correctly in the Board’s view, the court may under this sub-rule make orders of its own initiative. There is no reason why the court, faced with an application to strike out, should not conclude that the justice of the particular case militates against the nuclear option, and that the appropriate course is to order the claimant to supply further details, or to serve an amended statement of case including such details, within a further specified period. Having regard to Rule 26.6, the court quite probably also feel it

appropriate to specify the consequences (which might include striking out) if the details or amendment were not duly forthcoming within that period.”

- [30] It should be noted that the Claimant has already been permitted to amend his statement of claim, which he has done, so that at this stage the court is concerned with whether there is a cause of action as pleaded by the Claimants in this amended statement of claim. Is the statement of claim as it stands sufficient or insufficient to entitle the Claimant to what he is seeking?

### **Limitation Period**

- [31] In determining whether the Claimant’s cause of action should be struck out in this case, consideration must be given to the limitation period.
- [32] **Section 3(1)** of the Limitations (Public Authorities) Act, Cap. 206 provides:

“No action or other proceeding shall be brought against any person for any act done in pursuance or execution or intended execution of any Act or of any public duty or authority or in respect of any neglect or default in the execution of any such Act, duty or authority, unless it is commenced before the expiration of 3 years from the date on which the cause of action accrued.”

- [33] **Section 20** of the Limitation of Actions Act, Cap. 231 speaks to limitation of actions for personal injuries. **Section 20(3)** provides that:

“An action to which the section applies should not be brought after the expiration of the period of 3 years from the later of

- (a) the date on which the cause of action accrued; or

- (b) the date on which the person injured acquired knowledge of his cause of action.”

[34] By **section 6** of Cap. 231:

“No action founded on tort may be brought after the expiration of 6 years from the date on which the cause of action accrued.”

[35] Additionally **section 52(1)** of Cap. 231 gives the court a broad discretion to exclude the limitation period in personal injury matters.

It provides:

“If the court considers that it would be equitable to allow an action to proceed having regard to the degree to which

- (a) the provisions of section 20 or 22 prejudice the plaintiff or any person whom he represents; or
- (b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents,

the court may direct that those provisions shall not apply to the action, or do not apply to any specified cause of action to which the action relates.”

[36] In the case of *Donovan v. Giventoys Ltd [1990] 1 WLR 472*:

“The primary purpose of the limitation period is to protect a defendant from the injustice of having to face a stale claim, that is, a claim with which he never expected to have to deal. In weighing the degree of prejudice suffered by the defendant it must always be relevant to consider when the defendant first had notification of the claim and thus the opportunity he will have to meet the claim at trial if he is not to be permitted to rely on his limitation defence.”

[37] The case of *Firman v Ellis [1978] 2 All ER 851* exemplifies how the court exercises the discretionary power conferred on it in an action for personal injury where the time limit has expired and it appears equitable and just to do so. The court held that parliament conferred an unfettered discretion to allow any action for damages for personal injuries to proceed after the nominal three year limitation has expired if it appeared equitable to do so. At page 909 of the judgment **Lord Denning M.R.** noted that:

“In a personal injury case a plaintiff is not absolutely barred by the three year time limit. The judges have discretion to override the time limit where it is fair to do so.”

[38] In determining what is fair, the court considers the factors expounded under **section 53(1)** of Cap. 231. It is a balancing exercise in that the court must balance the prejudice to the Defendant if the action is dismissed at this stage and the prejudice to the Claimant if the matter is allowed to proceed.

[39] In *Cain v. Francis [2008] EWCA Civ 1451* **Smith LJ** at paragraph 73 noted:

“The length of the delay will be important, not so much for itself as to the effect it has had. To what extent has the defendant been disadvantaged in the investigation of the claim and/or the assembly of the evidence, in respect of the issues of both liability and quantum? But it will also be important to consider the reasons for the delay. Thus there may be some unfairness to the defendant due to the delay in issue but the delay may have arisen for so excusable a reason that, looking at the matter in the round, or balance, it is fair and just that the action should proceed. On the other hand, the balance may go in the other direction, partly because the delay has caused

procedural disadvantage and unfairness to the defendant and partly because the reasons for the delay (or its length) are not good ones.”

[40] Based on the facts in this case, the cause of action accrued on 3<sup>rd</sup> March, 2009 but the matter was not filed until 22<sup>nd</sup> February, 2013. Counsels for the Defendants note that **section 20** of the Limitation Act bars the claim against the First Defendant, while the Second and Third Defendants contend that they are protected by the Limitations (Public Authorities) Act which requires any claim against public authority to be filed within three years of the cause of action. A perusal of both pieces of legislation indicates that the claim is indeed statute barred, there is no denying this. However pursuant to **sections 52** and **53** of the Limitation Act, the court has an overriding discretion to extend the limitation period after taking into consideration the factors stated therein where it is fair to do so.

[41] However it should be noted that the Claimant is no longer pursuing the matter against the First Defendant but only against the Second and Third Defendant respectively for damages as a result of injury caused by the battery to him by the First Defendant.

### **Vicarious Liability**

[42] It therefore becomes necessary at this stage to discuss the principle of vicarious liability to determine whether the Second Defendant (employer) is vicariously liable for the actions of the First Defendant (employee).

[43] In an action for vicarious liability, the courts use the ‘close connection’ test as expressed in *Lister v. Hesley Hall Ltd. [2002] 1*

AC 215 to determine whether the employee's tort is so closely connected with his employment as to make it just to hold the employer liable.

[44] In *Mohamud v. WM Morrison Supermarkets plc* [2016] 2 WLR 821, the court held that on a claim that an employer was vicariously liable for the tort committed by one of its employees," the established test was to inquire as to the nature of the employee's job and then ask whether there was sufficient connection between that job and the employee's wrongful conduct to make it right, as a matter of social justice, for the employer to be held liable; and that such test, albeit imprecise and requiring the court to make an evaluative judgment in each case having regard to the circumstances, remained good without need of further refinement."

[45] The Claimant in this case therefore has to show that the actions of the First Defendant are closely connected with his employment in order to establish vicarious liability. Generally speaking, an employer has a duty to provide a safe place of work for his employees (*Legall v. Skinner Drilling (Contractors) Ltd.* BB 1993 HC 14) but will not be liable for an assault committed by his employee unless done in the wrongful exercise of a discretion vested in the employee. Furthermore, personal acts of vengeance or spite, though generated by employment will not render the employer vicariously liable – see Clerk and Lindsell on Torts, 19<sup>th</sup> edn. Paragraph 6–40 pages 344–345.

[46] In looking at the pleadings, the Claimant has shown that there was an employer/employee relationship but has not shown that there was a

connection between the First Defendant's actions and his employment as a labourer. There is not sufficient connection between the First Defendant's job and his conduct to demonstrate that the First Defendant was exercising discretion as a labourer when he attacked the Claimant. This coupled with the fact that the Claimant's action is statute barred which provides a defence to the Second and Third Defendants means that the claim must fail.

### **CONCLUSION**

[47] The Defendants succeeds. The claim against them is struck out in its entirety for the reasons given above.

**PAMELA A. BECKLES**  
Judge of the High Court